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Democratization of the Administration – From the Top Down and/or From the Bottom Up

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Civil Society and Administration

In this article I will examine from the analysis of the reforms of Japanese administration whether the possibility exists that civil society can contribute to the democratization of state organizations. I will also refer to the theoretical debate in Germany in order to gain useful suggestions for this study.

Civil society consists of many kinds of groups which aim to spread their own views and interests. It is true that interest groups have long existed in every democratic country. They have acted, and still now act, politically, but their relationship with politics has been faced with the same skepticism as corporatism or cliental politics. This negative image comes from the modality and use of their influence. Their political power relies on their economical power, and so they are not transparent or open to the public. Their dialogues with state organizations are mostly not open to public scrutiny. This mechanism seems to give some groups a privileged status.

I realize that the attention to civil society has grown because the activities of various groups *in* society have shown significant influences on national and international politics in recent years. Citizens exercise their freedom of speech and association to appeal to the public for some issues which they believe are necessary to improve or “save” the society. These voluntary activities have been playing an important social and political role. The basis of their influence lies in support from citizens. The main field of their activities is the civil society itself, not in the direct connection with state organizations, even if they want to influence the political process.

In the parliamentary system, parliament is the central organ to sum up the various interests and views of the people. Parliament and the ruling parties have been criticized, however, for being not sensitive enough to the real wishes of citizens. Jürgen Habermas, a

* Professor of Law, Kyoto University. This article is a revised version of my lecture at the workshop “Roles of Citizen/Civil Society and Responsibility of State” in the IVR World Congress in Frankfurt am Main in 2011. I thank Tatsuji Ohno for his invitation to the workshop and his comment there.

central figure in stressing the political role of civil society, has observed, “Even the political parties, which, according to the German Basic Law, Article 21, are entitled to ‘participate in forming the political will of the people’ have now become an independent power cartel integrating all branches of government.”¹ It is expected that the influences from civil society can break this cartel and make the lawmaking process more transparent and sensitive to the discussions outside of parliament. “Here the social substratum for the realization of the system of rights consists ... in the currents of communication and public opinion that, emerging from civil society and the public sphere, are converted into communicative power through democratic procedures.”²

As Habermas recognizes, however, the power of parliament as legislator has weakened in the face of today’s complex social conditions. In order to correspond to the rapid changes of knowledge and technology, the contents of laws cannot be stable or concrete. “The weak binding power of regulatory law, however, demands compensations primarily in the area of *administration*, where officials can no longer restrict their activity to a normatively neutral, technically competent implementation of statutes.” When the administration must decide politically, it should do so “in forms of communication and according to procedures that satisfy the conditions of constitutional legitimacy. This implies a ‘democratization’ of the administration.”³ One can call this manner of “democratization” as a bottom up process because communication starts at the grass root level and grows its influence toward the top of the administration.

This demand of democratization of the administration has difficulties, however, because it does not have such a fixed form as parliament has in the Constitution. There is no universally right answer to the problem which forms of participation are most legitimate and suited to reflect the opinions of citizens. Habermas describes it as “a question of the interplay of institutional imagination and cautious experimentation,” but he thinks of course that this is an experiment worth trying.⁴

When one refers to the democratization of the administration, however, one does not necessarily mean strengthening the influence of civil society. I will explain the ambivalence in this concept by showing the experience of the reform of administrative organizations in Japan.

The Reform of the Administrative Organization in Japan

In the 1990s the most important reform of administrative organizations since the 1940s was carried out in Japan. The central aim of this reform was to break the “rule of bureaucracy,” which was considered as the characteristic of Japanese society as a whole. The lack of transparency of the policy-making process in Japan was criticized both within and without. The Basic Act on Central Government Reform, the law summarizing the reform policies, included provisions which prescribed the administration to open its structure to greater public participation and scrutiny. The effort to foster greater transparency of

¹ Jürgen Habermas, *Between Facts and Norms* (1996), transl. by William Rehg, p. 434.

² Ibid., p. 442.

³ Ibid., p. 440. See also James Bohman, *Public Deliberation* (1996), pp. 188-192.

⁴ Ibid., p. 441.

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government processes and actions was partially realized with the passage of the Freedom of Information Act in Japan. In addition it sought to ensure that “the government will reflect the public opinion in the policy making and keep this process fair and transparent.” When the government wants to formulate an important policy, it should make its proposal public in order to “invite opinions of specialists, persons concerned and the people in general” and take these into consideration (so called “public comments”).⁵ “Public comments” were introduced by a revision of the Administrative Procedures Act.

These measures presupposed a positive role of the smooth flow of information across the boundary of administrative organizations. The laws seeking to foster greater fairness and transparency reflected long standing criticisms of the Japanese bureaucracy that it acted in the opaque manner in its dealings with interest groups. These reforms envisioned the participation of various citizens many of whom did not have privileged status. We might say that the reformers were aware of the significance of civil society as the force for democratizing the administration.

However, this manner of democratization was never envisioned as the focus of the reform agenda. Its main aim was the “reinforcement of the function of cabinet.”⁶ The Basic Act on Central Government Reform set forth clearly that the prime minister has the explicit power to propose important policies in the cabinet and founded new organizations to support the function of the cabinet, especially the office of the prime minister. The reform flowed from the belief that the administration should be democratized from the top down. The political legitimacy derives from the will of the people which is shown primarily in the result of elections, and so the ministers, especially the prime minister, should lead the administrative organizations powerfully.

At the same time a certain constitutional theory which aimed to strengthen the democratic legitimacy of the cabinet came to exert great influence in Japan. It insisted that the election should function in fact as the direct decision of the ruling party and the cabinet. In Japan the LDP possessed the majority of parliament for a long time. Therefore the election did not function as the chance to select the ruling party. The cabinet changed only as a result of struggles in the party. This political situation seemed to be a possible reason why the government was chronically so weak. Because it could not rely on the mandate of the electorate, it could not accomplish its policies against the sustained resistance of the bureaucracy. It was said that to break this boundary, the cabinet should derive their political legitimacy from the direct consent of the people. This theory did not demand the introduction of the presidential system (this would require a constitutional amendment), but the changes to the election and party system sought to frame the election as an opportunity to endow the cabinet with a true public mandate. It aimed also to democratize the administration by strengthening the actual power of ministers.⁷

We can see from what has been said that the reform in Japan included two different ways to democratize the administration, though this fact was rarely mentioned. Though these alternatives could cooperate to break the power of the bureaucracy, there was, theoretically

⁵ Basic Act on Central Government Reform, Art. 50.

⁶ Basic Act on Central Government Reform, Art. 1.

⁷ See Kazuyuki Takahashi, *Kokuminn-naikaku-sei no Rinen to Un'you* (Idea and Practice of the Cabinet Selected by the People) (1994).

viewed, a deep tension between them. In order to democratize the administration from the top down, one may suppose, the organization should be structured hierarchically. Its aim could be realized only by the recognition by the permanent bureaucracy of the principle of ministerial leadership and responsibility. To the contrary, opening the administration to the inputs from civil society implies weakening the function of hierarchy. It would mean the recognition of the democratic legitimacy of the policy-making process at the bottom of the organization which cooperates with outside transparently. However, regrettably no debate is underway in Japan on the relationship of the different potentialities implicit in the comprehensive reform of the administration.

In Germany, in contrast, the normative meaning of the various administrative organizations has been discussed as an important problem of Constitutional Law. We will now turn to the consideration of this dispute to know the problem more exactly.

Controversy About the Content of Democratic Legitimacy in Germany

Christoph Möllers insisted in 1999 that the meaning of democracy for the organization of the administration was one of the most disputed themes in German public law. The main issue is “if there can be another model of legitimacy of administration than the classical form of the administrative organization which is directed at the ideal type of hierarchical ministerial administration.” It is said that the projects to give some administrative organizations the autonomous legitimacy are enabled by opening them to subjects who can claim their status to democratize them. The opposite side asserts that such a chance of participation of persons concerned cannot claim democratic legitimacy at all.⁸

This controversy was sharpened in Germany during the 1990s when the German Federal Constitutional Court showed a very hard attitude against the doctrine of “autonomous legitimacy” of the administration. It declared a law of a *Land* unconstitutional which allowed a representative organ of public servants to participate in the decision-making process of the administration about all matters concerning themselves. The Court thought that the principle of popular sovereignty implied that the people should influence the activities of the state effectively. To guarantee this constitutional request, it demanded so called “uninterrupted chain of legitimation” from the people via a parliament selected by them and the government relying on its confidence to the public servants bound by the orders of the government. In contrast, the participation of public servants could not have a meaning of democratizing the administration. It was the people as a whole that should influence the acts of the state. No parts of them could have privileged status. To give the representative organ of public servants the authority to decide with the administrative organizations meant to privilege a special interest group, however. “There is no room for ‘autonomy’ of public employees even in the matters of public employment.” The principle of democracy required that only the positions which could take responsibility to parliament through the control of the government might make the last decisions.⁹

⁸ See Christoph Möllers, “Braucht das öffentliche Recht einen neuen Methoden- und Richtungsstreit?” in *Verwaltungsarchiv* 90 (1999), pp. 187, 188f.

⁹ BVerfGE 93, 37, 66-70.

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The Constitutional Court showed its concept of democracy more clearly in a decision against the suffrage of foreigners. It declared there that the holder of the sovereign power was the people and that this people meant the German nationals, which built a united group as the subject of democracy. The principle of popular sovereignty did not imply that the decisions of the state should be legitimated by the persons concerned at each time. Democracy presupposed by the German Basic Law had nothing to do with the idea that the holders of political rights should be congruent with the persons subject to the state power.¹⁰

This hard attitude of the Constitutional Court was supported by the constitutional theory of a judge of that day, Ernst-Wolfgang Böckenförde. According to this theory, democracy, first of all, is a political concept and the people as the sovereign are forming “a political unity of destiny” which has to decide as a unity. In this sense, it cannot be dissolved into an amalgam of private persons who aim to participate according to their own interests only. Therefore, he distinguishes strictly between democracy as a political principle and the demands of various particularistic groups (pressure groups) to influence on policies as an expression of private interests.¹¹ In fact, he assigns the parliament to legitimately monopolize the representation of the sovereign because only it is selected by the whole people in the framework of parliamentary system. According to his theory, the participation of particularistic groups in the democratic decision-making process violates democratic principles. It may rather disrupt the function of democracy also by obstructing the orders of the government responsible to parliament. Therefore, the administrative body has to be structured hierarchically to secure the legitimate flow of political authority.

One can realize easily that Böckenförde’s theory is much influenced by the decisionism of his teacher (*Lehrer*) Carl Schmitt. Such a theory seems to take a too state-centered view of democracy and tends to forget the real situation of the people. The daily politics need not demand the decision of the people destined to unify themselves, but should grasp their various wishes. “The people as a whole” should not be treated as a mythical entity.

Many scholars have criticized the understanding of democracy by Böckenförde and the Constitutional Court as far as the Court followed his positions during his tenure. The Basic Law itself seems to allow various structures of federal administration in Art. 86 and 87. In today’s complex society, furthermore, the “effective” influence of the people on policies which the Court demanded in some decisions during Böckenförde’s tenure cannot be realized by the only one way through parliament. The fetishism of “uninterrupted chain of legitimation” cannot give the people any real power. Just to substitute for this weakness, it is necessary to consider various structures of administrative organizations which can keep up with the real wishes of the people. In contrast to the abstract legitimacy of politicians selected by elections, the groups of citizens do not lose their concrete existence in the society even in the process of participation. Public interest can be found not by ignoring various interests of private citizens, but only by considering them with a broad outlook.¹²

¹⁰ BVerfGE 83, 37, 50-52.

¹¹ See Ernst-Wolfgang Böckenförde, “Demokratie als Verfassungsprinzip” in idem, *Staat, Verfassung, Demokratie* (1991), pp. 289, 311-316.

¹² See, e.g., Brun-Otto Bryde, “Die bundesrepublikanische Volksdemokratie als Irrweg der Demokratietheorie, Staatswissenschaften und Staatspraxis” in *Staatswissenschaften und Staatspraxis* (1994), 5, p. 305; Alfred Rinken, “Demokratie und Hierarchie” in *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* (1996),

Horst Dreier shows a balanced position about this problem. He admits the necessity of the hierarchy principle in administrative organization in order to secure democratic legitimacy, but is cautious not to treat it as an absolute claim. The function of hierarchy is dependent on many conditions which are now difficult to meet, for example, clear provisions of laws and a stable environment. Without these the administration itself becomes a “power factor.” In order to control it and make it work appropriately for concrete situations, the participation of citizens is needed.¹³ On the other hand, he is aware that the independence of administrative sectors includes the danger that they might liberate themselves from the political programs of the state as a whole and pursue their segmental interests with the opaque cooperation with particular groups. The law must prevent this danger by keeping the control of these organs. It should prescribe the basic frame of policies to be made, fair rules of participation, transparency of the process and so on. Then these organs could claim their democratic character to some extent, even if not the people as a whole, but only persons concerned participate. Autonomy is not irrelevant to democracy. “Only the balance between unity and plurality” is the right answer to the problem of legitimacy of the public administration.¹⁴

In fact, the German Federal Constitutional Court itself has relaxed its hard attitude against the autonomy of the administrative organization after the retirement of Böckenförde. In a decision for an autonomous administrative sector, it admitted that the democracy which demanded real influence of the people allowed organization types different from the hierarchy. Both democracy and functional autonomy were based on the idea that people should decide themselves freely. “The Basic Law allowed also special forms of participation of persons concerned in the exercise of public functions.” Of course, their structure should secure fair consideration of the interests concerned.¹⁵

We can conclude that to organize the administrative body strictly according to the principle of hierarchy in order to strengthen the political leadership ignores the real roots of deficits of democracy. We should point out, however, that even the theory in Germany asserting that the hierarchical principle has only a relative validity admits the necessity of control of the law which should include the rules making the participation in the administration fair and transparent. Only then the participation of citizens can be worth trying to democratize the state administration. When these conditions are met, on the other hand, we should not be too cautious about the role of civil society even if it consists of groups claiming particularistic aims. Policies should be made during an administrative process which attempts to gather various claims and to transform them to policies in the public interest. We should stress the importance of this process all the more, because its participants cannot be appointed through such an official process as the election, even if the administration tries to select them as fairly as possible. Their considerations, therefore, should be exposed widely to criticism from the outside.

70, p. 282; Thomas Blanke, “Antidemokratische Effekte der verfassungsgerichtlichen Demokratietheorie” in *Kritische Justiz* (1998), 31, p. 452. See as a book supporting the doctrine of Böckenförde, Matthias Jestaedt, *Demokratieprinzip und Kondominalverwaltung* (1993).

¹³ See Horst Dreier, *Hierarchische Verwaltung im demokratischen Staat* (1991), p. 145-157.

¹⁴ *Ibid.*, pp. 283-293. See also Thomas Groß, *Das Kollegialprinzip in der Verwaltungsorganisation* (1999), pp. 165-199, 251-270.

¹⁵ BVerfGE 107,59, 91-94.

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I want to add that democratizing the administration from the bottom up does not necessarily mean a pursuit of consensus of all relevant groups in the society. Consensus is desirable, of course, but the aim of an administrative procedure which is open to concerned persons does not imply the necessity of consent as such. It only aims at making policies suited to the concrete situation. To give each group a veto power might diminish its readiness to compromise and disrupt the function of the respective procedures. Discussion must be ended at some time and the matter must be decided even against the objection of a minority. The term of deliberation must be neither too short nor too long. It is also the responsibility of the officials who act under the control of the government to find the timing suited for the decision.¹⁶

“Public Comments” and Councils in Japan

We have now gained the theoretical viewpoints to consider the possibility and conditions of democratization of the administration from the bottom up. We will now analyze the concrete measures taken by the reform of administrative organizations in Japan. As we have seen, its main concept was to strengthen the leadership of the cabinet. Therefore, the risk to lose the unity of policies which is truly included in the democratization from the bottom did not need to be worried sincerely. On the other hand, it did not try to close the organization to accomplish the orders of the ministers, but tried to open it to be able to reflect people's real wishes. Although the reform admitted the ultimate superiority of officially elected politicians, it did not take a fictitious view about their democratic legitimacy. We can say that the project itself took a balanced way to reform the Japanese bureaucracy, although it was not fully aware of it. Of course, there remain concrete problems to be mentioned.

As we have already seen, the reform introduced the institution of “public comments.” The revised Administrative Procedures Act requires that after comments are gathered the administration make public the summary of the comments and its reactions to them. If it does not adopt some opinions, it must show the reason. The law does not allow it to ignore them. “Public comments” have been established as a normal step to make policies.

There are critical comments to the democratizing role of “public comments,” however. Comments are invited only after the courses of the policies are decided in the administration. The competence to judge how persuasive each comment is also remains by it. “Public Comments” do not involve the process to construct policies with citizens' ideas. We have to concede that just because of this weakness this reform did not raise a large resistance in bureaucracy.¹⁷

I can agree with this criticism, but I still want to stress the important meaning of “public comments.” It gives all citizens official chances to say something concretely about policies of the state, although as a result their power remains very weak. Not only the privileged interest groups, but all the persons concerned gain the possibility to influence them. It has stimulated activities of many groups in fact. Furthermore, the response of the

¹⁶ See Armin von Bogdandy, “Demokratisch, demokratischer, am demokratischsten?” in *Festschrift für Alexander Hollerbach* (2001), pp. 363, 373-376.

¹⁷ See Akiko Toyoshima, “Public Comments” no Igi to Kadai (Significance and Problems of “Public Comments”) in *Jumin-sanka no System-kaikaku* (Tsutomu Muroi ed. 2003), pp. 174, 189f.

administration to the comments which is opened to the public might arouse continuing debate. Anyway, “public comments” do not involve any severe problem of legitimacy. They are not exclusive, and the power to control the process remains undoubtedly by the administration.

To the contrary, councils which consist of limited members appointed by the administration and deliberate on specific policies to make a proposal were treated coldly in the reform. The Basic Act on Central Government Reform prescribed to abolish them in principle¹⁸. This rather radical judgment against the councils could be explained by the idea that in fact they are covers of the bureaucracy. Only the specialists who are friendly to the bureaucracy are gathered and they rather disrupt the leadership of politicians by relying on their professional authority. Councils became then a symbol of the opaque relationship between the bureaucracy and interest groups.

Is it really possible, however, for the administration to build policies without councils? Tokiyasu Fujita, a famous professor of Administrative Law and one of the central figures of the reform project, thinks it is possible. He supposes that the establishment of both “public comments” and “the meetings of specialists in the true meaning” is able to substitute for councils and function better than these.¹⁹ It means that the organs for democratic legitimacy and for technical reasoning can and should be separated. The meetings of limited specialists should be purified to technical problems without political relevance.

This severance seems both impossible and undesirable, however. The power of “public comments” is weak, as we have seen. Moreover, it is illusionary to suppose the place purified from politics. In the technical problems so highly developed that the help of specialists is needed, we cannot expect their agreements. Especially, the problem what society should do with uncertain data and analyses divides them necessarily according to their political attitudes. They cannot help considering the related interests in the society. And so, the inevitable political meaning of their activities arouses critics in the public inevitably. The knowledge of specialists has only a relative superiority to that of citizens at least in the politics and should not be treated as an authority free from criticism of citizens. We need not refer to Carl Schmitt to understand that everything could be a ground of political controversy.²⁰

Fujita’s theory may come from his concern that the discussion of limited members cannot claim democratic legitimacy. But this seems a too narrow conception of it. When the rules of participation and discussion are improved to fulfill the standards of fairness and transparency, the role of councils to democratize the administration should not be denied. Contrary to “public comments,” they are able to build policies autonomously. I suppose that well equipped councils can gather both technical information and its political implication from various sides of specialists and citizens concerned with social problems. It is meaningful from the viewpoint of democracy to build up public policies through their discussion. To improve the democratic character of councils, we must take care of the

¹⁸ See Basic Act on Central Government Reform, Art.30 (2)

¹⁹ See Tokiyasu Fujita, “Singikai-seido Zakkan (Some Consideration on Councils)” in *Gyoseiho no Kiso-riron II* 242 (2005). See as criticism Hiroshi Shiono, *Gyoseiho III* (Administrative Law III) (3rd ed. 2006), pp. 80-82

²⁰ See Carl Schmitt, “Das Problem der innerpolitischen Neutralität des Staates” (1930) in idem, *Verfassungsrechtliche Aufsätze* (1958), pp. 41, 49-51.

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connection of discussions between inside and outside. They should be exposed to critics in order not to be transformed to a place giving privileges to specific interests. Transparency is indeed demanded for the councils saved from abolishment also in the Basic Act.²¹ In recent years many interim reports of councils are publicized and “public comments” on them are invited which are able to exert an influence on the final version. The combination of procedures like this surely contributes to improving the legitimacy of proposed policies.

Several measures have been taken in Japan to advance the fairness of the appointment of members of councils, for example, to require the agreement of parliament and to advertise for the position publicly. The former enables to examine the aptitude of candidates publicly, but involves the danger to strengthen the political antagonism in councils. I suppose that this risk is not so high in Japan, however, because the social groups there are not structured according to the inclination of political parties.

In these years, the practice of inviting applications for the council members from citizens has been spreading rapidly in the local governments. It is not clear, however, if this method is suited to the role of councils to gather relevant knowledge and to adjust the interests concerned.²² It is true that each council is established for a specific aim and is not the general representative organ of the people. With this method of selection, however, it becomes possible to recruit persons concerned with whom the administration has no contact. It is impossible for the officials of the administration to make clear who has a relevant interest with the topic to be discussed, even if they want to gather relevant ideas widely. To improve the democratic character of councils, after all, the relevance should not be decided one-sidedly by the administration. We can consider the public invitation of council members to be a method to open them to the persons concerned who act independently of the state so far. I think that this method is not contrary to the character of councils. In fact, most applicants are the persons who are much interested in the theme. If more persons apply for the position than needed, therefore, the members should not be decided by lot, but the persons who have more relevant interest and more knowledge should be selected. We should not forget that even so the interests represented in a council cannot be perfectly comprehensive. All the more, the officials cannot be indifferent to the process of the deliberation in councils.²³

The public invitation of council members enlarges the chance of the groups in civil society to participate in the policy-making process. This has a positive meaning for its democratic character, because they have the background of the citizens supporting their views freely. Differing from the interest groups which gain their political power from their economical influence, furthermore, the groups acting in civil society have to take care of the transparent relationship between inside and outside the councils. We must notice, however, that their opinions remain those of partial groups in the society. There is no group which is representative of the people as a whole, and the amalgam of the groups in councils is not yet

²¹ See Basic Act on Central Government Reform, Art.30 (5). In fact, as Fujita recognizes, the number of councils did not diminish drastically through the reform.

²² See Akiko Toyoshima, “Shingikai ni okeru Jumin-sanka no Mondai (The Problems about the Participation of Citizens in Councils)” in *Jumin-sanka no System-kaikaku* (Tsutomu Muroi ed. 2003), pp. 174, 189f.

²³ See Hans-Heinrich Trute, “Die demokratische Legitimation der Verwaltung” in *Grundlagen des Verwaltungsrechts*, Bd. I (2006), p. 307, marginal note100 (saying that the cooperation with private persons rather increases the burden of the administration.)

equal to the people. The administration has to take care to keep various opinions heard in the discussion and, as I have already said, to end it when it is ripe enough to decide. Opinions of each group themselves are not worth realizing. The councils must take responsibility for building up public policies from various real wishes of the people. There may remain losers. Of course, the attachment of a minority opinion may be meaningful to give useful information for the discussion which can and should continue after the end of the deliberation in the councils.

We can now conclude that opening the administration to civil society is not an easy task. It includes both the possibility to democratize it and the danger to invite its dysfunction. The real concerns of the people should be heard, but at the same time they must be transformed to public policies through deliberation. The moderate control of officials is needed in this process, but it must not be excessive, otherwise the autonomous dynamics of the process would be suffered. Anyway, “this ambivalence is to be endured”²⁴ to make the state organizations more democratic.

²⁴ Dreier, *Hierarchische Verwaltung*, p. 275.